

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE

UNITED STATES

October Term, 1978

No. 78-264

EDWARD JOSEPH WEDELSTEDT,
Petitioner,

v.

STATE OF IOWA,
Respondent.

PETITIONER'S REPLY MEMORANDUM

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In its Brief in Opposition to the Petition for Writ of Certiorari, the State of Iowa raises two issues: (1) that said Petition was not timely filed and (2) that no federal question is presented by the Petition. Neither objection should dissuade this Court from granting review of Petitioner's conviction.

As Respondent notes, the instant Petition was filed on August 16, 1978, some 91 days from the date on which the Iowa Supreme Court denied a rehearing. As Respondent also notes, an untimely filed Petition does not constitute a jurisdictional defect, *Taglianetti v. United States*, 394 U.S. 316, fn. 1 (1969). In the *Taglianetti* case, this Court entertained a Petition for Certiorari filed 11 days out of time. This Court has, in numerous other cases, entertained such untimely filed petitions. In the case of *Smith v. Mississippi*, 373 U.S. 238 (1963), a Petition reached the Court one day late but had been mailed four days prior to the due date. Counsel for Petitioner filed a Motion that the Court consider the out-of-time Petition, but the Court granted the Petition without mentioning or acting on the motion. In *Fuller v. Alaska*, 393 U.S. 80 (1968), a Petition was filed by new counsel nearly a month after the expiration of the ninety-day period. No excuses or extenuating circumstances as to the tardiness were set forth. This Court, without mentioning the time problem, granted the Petition and ruled on the merits of the case.

In the instant matter, a Petition was prepared by recently obtained counsel, as in the *Fuller* case. Counsel for Petitioner mailed the Petition to this Court on August 14, 1978, by Express Mail. The Express Mail service involves a guarantee that the article mailed will arrive at the destination by 3:00 P.M. the following day — in this case, August 15, 1978, the 90th day of the time period. As such, counsel for Petitioner felt secure in his belief that the Petition would arrive within the 90 day period. Apparently, the Petition did not arrive on August 15, 1978, or arrived on that date and

was not docketed until the following date. In either case, as in the *Smith* opinion, the docketing of this Petition on August 16 should not prevent this Court from reviewing the Petition on its merits.

Respondent's second claim that no federal question is presented by the Petition is contrary to the very cases cited in the Petition, cases which Respondent does not discuss or distinguish. In the cases of *Thompson v. City of Louisville*, 362 U.S. 199 (1960) and *Vachon v. New Hampshire*, 414 U.S. 478 (1974), this Court reviewed and reversed state court convictions which were based on insubstantial evidence. This Court had no difficulty in finding that such convictions violated Defendant's Fourteenth Amendment due process rights. Further, the several cases which Petitioner cited involving review by this Court of entrapment issues also concerned a review by this Court of the factual basis for lower court decisions. In the entrapment cases, this Court had also delineated in finding the existence of a substantial federal question.

Respondent's attempted distinction of the *Overmann* case is negated by the very opinion which Respondent seeks to uphold. In its opinion in the instant case, the Iowa Supreme Court did not, as Respondent now contends, hold that the *Overmann* precedent was inapplicable to the facts below. Rather, the court held that the informer never possessed the stolen property solely as a government agent. Pursuant to the *Overmann* opinion, where contraband is supplied by the government to the Defendant and later reappropriated from the Defendant, take back entrapment is shown. As such, the evidence at trial created take back entrapment, and the state failed to present facts sufficient to refute such entrapment. For these reasons, the very doctrine of the Iowa Supreme Court required that Petitioner's conviction be overturned. The failure of that court to do so violated Petitioner's Fourteenth Amendment right to due process of law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of November, 1978, I mailed three (3) copies of the Petitioner's Reply Memorandum, by placing same in the United States Mail, postage prepaid, addressed to:

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